Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Qwest Communications International Inc.'s Consolidated Application for Authority to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota	)	WC Docket No. 03-11

COMMENTS OF AT&T CORP.

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In the Matter of Qwest Communications International Inc.'s Consolidated Application for Authority to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota	)	WC Docket No. 03-11

COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") respectfully submits these comments in opposition to Qwest's application for authorization to provide in-region, interLATA services in New Mexico, Oregon, and South Dakota.

INTRODUCTION AND SUMMARY

Qwest has presented the Commission with the *reductio ad absurdum* of the "approve now, enforce later" approach to section 271 applications. Apparently believing that no argument is too extreme in the current environment, Qwest asserts that residential local telephone consumers have real commercial alternatives and that its local markets are fully and irreversibly open to competition in a State in which *not a single residential customer is served by a competing wireline carrier*. Not one. Zero.

Emboldened by the approval of its 9-state application notwithstanding myriad checklist violations and an unrivalled pattern of discriminatory and unlawful conduct, Qwest now urges the Commission to slam the door on Track A arguments. The plain language of the Act, clearly expressed congressional intent, and the Commission's prior decisions, all require that a Track A applicant demonstrate that at least one other carrier provides a "predominantly facilities-based" residential service that is an "actual commercial alternative" to the applicant's wireline service. But New Mexico residential consumers have no such alternative, and Qwest thus proposes facially absurd loopholes that would swallow the rule. In Qwest's view: (1) "predominantly facilities-based" should include pure resellers that use *none* of their own facilities, and (2) "Cricket," a PCS carrier that markets small, brightly colored wireless telephones to teenagers and college students in two New Mexico cities, and which is in such precarious financial condition that it has been de-listed by NASDAQ, should qualify as an "actual commercial alternative" to Qwest's wireline residential services. It is astounding that Qwest would even make such arguments; it would be truly disturbing (and unlawful) for the Commission to accept them.

Congress has expressly spoken with respect to non-facilities-based resale services: "telephone exchange service offered exclusively through the resale of the BOC's telephone exchange service . . . does not suffice to meet the [Track A] requirement."[1] In any event, the particular New Mexico resellers identified by Qwest could not possibly qualify as actual commercial alternatives to Qwest's local services. The already quite small number of lines served by these resellers has dropped *30 percent* in just the three months since the New Mexico commission examined the data, and the overwhelming majority of the remaining residential resale lines are served by a single carrier that markets only to "a niche market" composed primarily of "high risk" customers' who have been *disconnected by Qwest* for failure to make

[1] House Conf. Rep. No. 104-458, at 147-48 ("Conference Report"), reprinted in 1996 U.S.C.C.A.N. 10, 160.

payments.[2] Thus, as the New Mexico Commission ruled, these resellers are not even "competing with Qwest for the same customers."[3]

Fundamental principles of statutory construction and reasoned decisionmaking also preclude the Commission from buying into Qwest's claim that Leap Wireless, which sells PCS service in New Mexico under the Cricket name, is an actual commercial alternative to Qwest's residential wireline service. Cricket markets highly specialized "lifestyle" wireless telephone services to very young adults (more than half of the customer base is apparently between the ages of 18 and 24). The idea that these highly mobile "Generation Y" customers (many of whom undoubtedly live with their parents, in college dorm rooms or in other temporary arrangements) are in any way representative of residential purchasers of Qwest's wireline service is simply absurd. And Qwest has not presented a shred of evidence that *any* wireline residential customer has actually substituted the Cricket service for Qwest's residential wireline service. It is quite obvious why Qwest has not done so. Cricket's wireless service lacks critical features that virtually all customers require of their local residential service, including E911, local number portability, multiple handset capabilities, and the ability to obtain DSL service. Moreover, Cricket is available in just two New Mexico cities. And according to the company's recent SEC filings, it not only has been de-listed, but is in default under its debt arrangements and faces a real possibility of involuntary bankruptcy. The Cricket service may be a well-packaged wireless service that is highly attractive to its target audience, but it is hardly an actual "commercial alternative" to Qwest's residential wireline service in New Mexico.

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[2] *Analysis Of Qwest Corporation's Compliance With Section 271(c) Of The Telecommunications Act of 1996*, Order Regarding The Public Interest, SDPUC Docket No. TC01-165, ¶¶ 132, 136 (Nov. 22, 2002) ("*Public Interest Order*") (emphasis added).

[3] *Id.*

As detailed below, there is no possible basis for the loophole in the Track A requirements that Qwest seeks. And without that loophole, Qwest's New Mexico application must be denied. Of course, the Track A problems highlighted here are merely symptoms of Qwest's pervasive discrimination and other anticompetitive conduct that has made New Mexico (and, indeed, much of the Qwest region) a particularly hostile environment for local competition. AT&T will not repeat here the many checklist, section 272 and public interest violations that commenting parties established, but the Commission rejected, in approving Qwest's 9-state application. Suffice it to say that much work remains to be done before the discrimination that permeates Qwest's OSS, pricing and other interconnection practices is cured. These comments instead focus on the additional checklist and other violations that are evident in New Mexico, South Dakota and Oregon.

The record demonstrates that there are multiple additional checklist violations in these states. In New Mexico, Qwest improperly categorizes intrastate calls as interstate calls for the purpose of computing reciprocal compensation levels. Unlike Qwest's *intra*state rates, Qwest's *inter*state have not been established under the guise of the Commission's TELRIC rules, and Qwest's practice is thus a clear violation of § 252 of the Act. In Oregon, where Qwest has deployed integrated digital loop carrier equipment, Qwest denies competitors access to loop qualification information regarding existing copper loops that is necessary to allow the competitor to assess whether DSL and other services can be provided to customers. This is likewise discriminatory and clear checklist violation. And in all three states, Qwest's SGAT imposes unlawful non-cost-based – and patently discriminatory – "entrance facility" charges to competitors.

Even beyond these Track A and checklist violations, a grant of Qwest's application would contravene the public interest, even under the most lenient standards. In granting Qwest's prior 9-state application, the Commission relied upon Qwest's paper promises that it: (1) had disclosed all such conduct; (2) would cooperate with the state commissions investigating that conduct; and (3) would cease all future unlawful and anticompetitive conduct. The Commission warned that it stood ready to act if Qwest failed to make good on its paper promises.

The Commission should now do so and reject this application. At the same time that Qwest was seeking and receiving section 271 approval of its 9-state application, Qwest was stonewalling state investigations of its unlawful "secret deal" transactions, forcing the New Mexico Attorney General to "move[] for sanctions to be imposed on Qwest," and leading the NMPRC to conclude that, as a result of Qwest's behavior, the record in that proceeding "may not contain all the documents Qwest was ordered to produce."[4] The NMPRC ultimately concluded that Qwest's failure to disclose myriad interconnection agreements went beyond struggles in a "gray area" and was willful and intentional. Moreover, the NMPRC concluded that Qwest likely still has not filed all such secret agreements. Thus, none of the prior reasons for disregarding Qwest's established pattern of unlawful and anticompetitive behavior can justify ignoring that behavior in this proceeding. Qwest can no longer credibly claim that it will voluntarily become a good citizen and cooperate with state investigations seeking to redress that behavior. And Qwest can no longer pretend that its unlawful and anticompetitive behavior was unintentional – that fantasy was thoroughly dispelled by the NMPRC's investigation.

Finally, a grant of Qwest's South Dakota application would contravene the public interest for a second and independent reason. Qwest's performance assurance plan for South Dakota will *not* serve as an effective deterrent against future backsliding. As Qwest acknowledges in its Application, it has refused to implement changes to critical provisions of its QPAP expressly ordered by the South Dakota Public Utilities Commission ("SDPUC"), even though the SDPUC

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[4] *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Final Order Regarding Compliance with (continued)

unequivocally stated that "in order for the Commission to find that Qwest's section 271 application is in the public interest, Qwest *shall make* the [specified] revisions."[5] Qwest's failure to implement those required changes further confirm that a grant of Qwest's South Dakota application would not be in the public interest.

I. QWEST CANNOT SATISFY TRACK A WITH RESPECT TO NEW MEXICO.

The Commission cannot approve a Section 271 application unless and until the application satisfies the requirements of section 271(c)(1)(A) ("Track A") or section 271(c)(1)(B) ("Track B").[6] Qwest has chosen to rely on Track A. But the record in this proceeding and in the state section 271 proceedings confirms that Qwest does not satisfy the Track A requirements in New Mexico, and that its application must therefore be rejected.

Section 271(c)(1)(A) requires that there are "competing providers of telephone exchange service to residential *and* business subscribers" and that such service is provided either "exclusively over [the competitors'] own exchange telephone service or predominantly over their own telephone exchange facilities in combination with resale."[7] The applicant must further show "that at least one 'competing provider' constitutes 'an *actual commercial alternative* to the BOC,' which a BOC can do by demonstrating that the provider serves 'more than a *de minimis* number' of subscribers."[8]

Qwest provides evidence that competitors in New Mexico serve a few *business* lines using their own facilities, but makes no showing that there is even a single competing provider of wireline telecommunications services in New Mexico serving *residential* subscribers through

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Outstanding Section 271 Requirements: SGAT Compliance, Track A, and Public Interest, Utility Case No. 3269 *et al.*, ¶ 260 (NMPRC October 8, 2002) ("*NMPRC Section 271 Final Order*").

[5] *Public Interest Order* at 1.

[6] 47 U.S.C. § 271(d)(3)(A).

[7] *Michigan 271 Order* ¶ 70.

[8] *Qwest 9-state 271 Order* ¶ 20. (citations omitted).

either its own facilities or through unbundled network elements.[9] Nor could Qwest make such a showing. As the NMPRC concluded, "there is no wireline facilities-based residential service by competing carriers in New Mexico."[10] And, as demonstrated below, the information Qwest has provided in this proceeding further confirms this finding.

Unable to satisfy the requirements of Track A, Qwest asks the Commission to ignore them. Qwest seeks approval of its application based on (1) a non-facilities-based resale service targeted at "high risk" residential customers, many of whom had their Qwest service cancelled for nonpayment, and (2) a single PCS service that is targeted at teens and college students in two New Mexico cities, that does not include E911, number portability, multiple handset or broadband capabilities, and that is provided by a financially distressed carrier recently de-listed by the NASDAQ exchange.[11] But resale lines cannot satisfy Track A; indeed, Congress specifically identified "telephone exchange service offered exclusively through the resale of the BOC's telephone exchange service" as a service that "does *not* suffice to meet the

[9] As the Commission consistently has recognized, Qwest's burden under section 271(c)(1)(A) is to demonstrate the existence of competing providers with respect to *both* business and residential subscribers, *i.e.*, business competition alone is not sufficient to satisfy Track A. *See*, *e.g.*, *Qwest 9-State 271 Order* ¶ 20 (the BOC must demonstrate that "one or more competing providers collectively serve *residential and* business subscribers") (emphasis added); *Michigan 271 Order* ¶ 70 (section 271(c)(1)(A) requires a showing that "there are unaffiliated competing providers of telephone exchange service *to residential and business customers*") (emphasis in original); *see also Sprint Communications Co.* v. *FCC*, 274 F.3d 549, 561 (D.C. Cir. 2001) ("Under the FCC's interpretation of § 271, a BOC cannot qualify under Track A unless it shows that at least one competing provider . . . serves more than a *de minimis* number of *residential and* business customers") (internal quotation omitted; second emphasis added).

[10] *NMPRC Section 271 Final Order* ¶ 126; *id.* ("Based on Qwest's admissions in the record, the Commission cannot find that unbundled loops are being used to serve residential end users in New Mexico").

[11] Application at 15; *NMPRC Section 271 Final Order* ¶ 126 ("[T]he Commission will determine . . . whether Qwest has satisfied Track A based on a showing that resellers and Cricket PCS constitute competing providers for Track A purposes").

requirement[.]"[12] Likewise, the PCS service identified by Qwest plainly is not "an actual commercial alternative to" Qwest's wireline service.

It is thus unsurprising that the NMPRC found that Qwest had failed to proffer evidence "that would enable this Commission to conclude with any measure of confidence that Qwest is in compliance with section 271(c)(1)(A), *i.e.*, that Qwest has shown that competitors are serving more than a *de minimis* number of residential end users in Qwest's service area in this State."[13] Because it viewed Qwest's reliance "on 100% residential resale competition and/or residential PCS-for-wireline substitution" as presenting "significant issues of first impression,"[14] the NMPRC declined to render "a dispositive recommendation respecting compliance or non-compliance with Track A," and instead deferred to the Commission "to render the ultimate conclusion."[15] As demonstrated below, there is not a shred of record evidence that could support a Commission finding that Qwest has satisfied its burden of proving that it satisfies Track A in New Mexico.[16]

A. Qwest's Data Confirm That There Is No Facilities-Based Wireline Competition In New Mexico.

No competitive carrier serves residential lines in New Mexico using predominantly facilities-based wireline services. The NMPRC conducted extensive proceedings – including discovery, hearings, and briefings – to assess whether there was sufficient facilities-based residential entry in New Mexico to satisfy Track A. The NMPRC even issued an order compelling CLECs to respond to surveys relating to Qwest's Track A compliance, which were

[12] Conference Report at 147-48 (second emphasis added).
[13] *NMPRC Section 271 Final Order* ¶ 154.
[14] *Id.* ¶156.
[15] *Id.* ¶¶ 156-157; *see* Application at 8.
[16] *See Kansas/Oklahoma 271 Order*, ¶ 29 ("the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of section 271").

designed to assess the extent of CLEC entry in New Mexico.[17] After all of this evidence had been submitted to the NMPRC, Qwest ultimately conceded that it could "not establish that *any* unbundled loops [were] being used to serve residential customers in New Mexico" and could offer "*no evidence* of landline, facilities-based residential service by competitors in New Mexico."[18] "Based on Qwest's admissions in the record," and after examining all of the evidence of network element and facilities-based competition (or, more precisely, the lack thereof), the NMPRC concluded that "there is no wireline facilities-based residential service by competing carriers in New Mexico."[19]

Qwest does not dispute this finding in its application, and the evidence upon which it relies serves only to confirm the finding. First, Qwest searched its E-911 databases and has submitted a table of data derived from that search which purports to show that there are 8,410 residential CLEC E-911 listings.[20] But a footnote reveals this figure as a complete fabrication. It is not based on E-911 data at all, but is instead "[an] estimate *produced by [Qwest]* of the number of . . . customers in New Mexico who are substituting . . . *PCS* service for wireline service."[21] Qwest's E-911 data thus confirms that there are *no* residential lines served by facilities-based wireline competitors in New Mexico.

Second, Qwest examined whether any of the lines it supplies to CLECs are listed in the residential section of its white pages.[22] Qwest claims that this experiment showed that there are a grand total of eight – *eight* – facilities-based CLEC lines in the entirety of New Mexico listed

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[17] *NMPRC Section 271 Final Order* ¶ 101.
[18] *Id.* ¶ 125.
[19] *Id.* ¶ 126.
[20] Declaration of David L. Teitzel, ¶ 55 (Jan. 15, 2003) ("Teitzel Decl.").
[21] *Id.*, at n.83.
[22] *Id.* ¶ 59.

in the "residential" section of Qwest's white pages.[23] This assertion is utterly unreliable in view of the facts that (1) *no* facilities-based CLEC has stated that it actually serves any residential lines in New Mexico (and Qwest has not itself identified any such CLEC), and (2) Qwest's own E-911 data show no facilities-based residential lines. In light of these undisputed facts, these 8 listings are almost certainly business lines that are mistakenly listed in the residential section of Qwest's white pages listing (or lines that are in fact served by Qwest or have no service at all). And Qwest has failed to provide evidence that a single one of these 8 listings is actually a residential customer.

But even if Qwest had shown that there are, in fact, 8 or fewer residential lines served by predominantly facilities-based competitors in New Mexico, that would hardly satisfy the Track A requirements. There is no rational standard under which *eight* lines – in a state with a population of nearly 2 million people – could be considered more than a *de minimis* number. The purpose of the "more than a *de minimis* number" standard is to ensure that there is, in fact, a legitimate commercial alternative to the incumbents' services. In prior applications, carriers have satisfied this standard by showing that hundreds or thousands of residential customers were served by facilities-based wireline CLECs. Qwest's purported showing of 8 such customers does not even come close to those levels, and certainly cannot be relied upon as legitimate evidence that New Mexico customers have a facilities-based wireline commercial alternative to Qwest's local telephone services.

This is clear from Commission and court of appeals precedents, which confirm that Qwest's showing is insufficient to satisfy its burden of proving Track A compliance. In the *Oklahoma 271 Order*, the Commission found that SBC had failed to satisfy the requirements of

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[23] *Id.*

Track A when it identified only one facilities-based provider that served 4 customers.[24] The court of appeals affirmed.[25] Qwest has provided even less evidence of Track A compliance than SBC did in Oklahoma. SBC identified a particular CLEC that provided local service; Qwest does not. SBC determined whether the customers were paying for the service; Qwest does not. SBC confirmed that the customers actually purchased service from a CLEC; Qwest has not. And SBC determined whether the service was offered as a "test service"; Qwest does not. On this record, it is clear that Qwest has offered nothing more than a guess that there may be a handful of residential customers of facilities-based competitors. That guess, whether accurate or not, falls far short of meeting Qwest's Track A burden.

B. Qwest's Showing With Respect To Resale Does Not Demonstrate That There Is An Actual Commercial Alternative To Qwest For Residential Service In New Mexico.

No previous applicant has forced the Commission to determine if Track A is satisfied where residential customers are served only via resale.[26] That is because there is only one sustainable answer: pure resale does not satisfy Track A. Rather, the Act makes clear that a competitive service must be provided "either exclusively or predominantly over [the competitor's] own telephone service facilities."[27] Although the competitive provider may use its own facilities "in *combination* with resale,"[28] reading the statute to allow resale alone to satisfy the Track A requirement would render the "own telephone service facilities" requirement a

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[24] *See Oklahoma 271 Order* ¶ 17.
[25] *See SBC Communications* v. *FCC*, 18 F.3d 410 (D.C. Cir. 1998).
[26] In prior proceedings, the Commission explicitly stated that it has not decided this issue. *See, e.g., Kansas/Oklahoma 271 Order* ¶ 43 & n. 101; *Louisiana II Order* ¶ 48.
[27] 47 U.S.C. § 271(c)(1)(A).
[28] *Id*.

nullity.[29] But even if there were any ambiguity on this point, the legislative history and overall statutory scheme preclude Qwest's proposed resale only construction.[30]

The legislative history to the 1996 Act confirms beyond doubt that Congress intended to prohibit a BOC from relying upon pure resellers to satisfy the Track A requirement. The Conference Report expressly states:

> With respect to the facilities-based competitor requirement, the presence of a competitor offering the following services specifically does *not* suffice to meet the requirement: . . . (2) *telephone exchange service offered exclusively through the resale of the BOC's telephone exchange service* . . .. The competitor must offer telephone exchange service either exclusively over its own facilities or predominantly over its own facilities in combination with the resale of another carrier's service.[31]

Indeed, the Conference Report makes plain that, in Congress' view, pure resellers are not even "competitors" within the meaning of section 271(c)(1)(A):

> [T]he conference agreement includes the 'predominantly over their own telephone exchange service facilities' requirement *to ensure a competitor offering service exclusively through the resale of the BOC's telephone exchange service does not qualify*, and that an unaffiliated competing provider is present in the market.[32]

The Commission itself acknowledged in the *Michigan 271 Order* that Congress made "clear that a new entrant offering service exclusively through resale of the BOC's telephone

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[29] *See, e.g., Ratzlaf* v. *United Sates*, 510 U.S. 135, 140 (1994) 114 S.Ct 655, 659 (1994) ("Judges should hesitate . . . to treat [as surplus] statutory terms in any setting.").

[30] *See, e.g., Brown & Williamson Tobacco Corp.* v. *FDA*, 153 F.3d 155, 162 (4th Cir. 1998) ("the traditional rules of statutory construction . . . include: the overall statutory scheme [and] legislative history" (citations omitted)).

[31] Conference Report, at 147-48.

[32] Conference Report at 148 (emphasis added). The statements in the House Report are consistent. *See* H.R. Rep. No. 104-204, at 76-77, reprinted in 1996 U.S.C.C.A.N. 10, 77 ("[R]esale . . .would not qualify [for Track A purposes] because resellers would not have their
(continued)

exchange service *does not satisfy* section 271(c)(1)(A).”[33] Although the Commission later noted that “overriding policy considerations” weighed against reading the statute “to require that there must be facilities-based service to both [business and residential] subscribers,”[34] the Commission’s policy agenda cannot lawfully override Congress’s clear intent to preclude BOCs from relying on pure resellers to satisfy Track A.[35] Accordingly, the Commission must flatly reject Qwest’s claim that it can satisfy Track A based solely on residential *resale* competition.

In any event, as the NMPRC concluded, Qwest failed to make an evidentiary showing that the residential resale carriers that it is relying on “are providing consumers with an actual competitive alternative.”[36] As an initial matter, the number of residential resold lines that Qwest claims in its Application is extremely small: a mere 1,033 lines.[37] Further, the NMPRC concluded that “the actual number of resellers and resold lines is *decreasing rapidly*” in New Mexico, a conclusion borne out by the fact that the number of lines served by resale plunged more than *30 percent* in just the three months between the NMPRC’s decision and Qwest’s federal application.[38] Given that resale is an inherently limited competitive vehicle (because resale-based competitors cannot alter the nature of the service they are reselling and thus cannot provide consumers with innovative or improved services), the small – and rapidly shrinking –

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own facilities in the local exchange over which they would provide service, thus failing the facilities-based test”).

[33] *Michigan 271 Order* ¶ 98.

[34] *Louisiana II 271 Order* ¶ 48.

[35] *See Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001) (“Congress has made its intent in the statute clear, we must give effect to that intent.”) (internal quotations omitted). *See also Miller* v. *French*, 530 U.S. 327, 336 (2000); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962).

[36] *NMPRC Section 271 Final Order* ¶ 154.

[37] Teitzel Decl., ¶ 64.

[38] *NMPRC Section 271 Final Order* ¶ 132 (basing findings on residential resale line count of 1,380 lines). The NMPRC also noted that Qwest’s figures for the number of residential resold lines were revised downward several times during the state section 271 proceedings. *Id.* ¶¶ 122-23 & n. 124.

amount of residential resale competition in New Mexico could not establish that consumers have a meaningful competitive alternative to Qwest even if pure resale counted in this context.

Moreover, the NMPRC found that the overwhelming majority of residential resale lines in New Mexico is served by a single carrier, and that the carrier serves only "a niche market composed primarily of 'high risk' customers who have been disconnected by Qwest for failure to make payments."[39] That is, the resale carrier "targets those customers who have been disconnected by Qwest for nonpayment" and provides them with *prepaid* local service at premium prices, and without offering long distance.[40] The NMPRC further noted that "[t]he remaining residential resale competitors operating in New Mexico are predominantly prepaid services charging similarly high local rates without long distance calling."[41] Because these resale services are targeted at only the very small subset of customers in New Mexico who have been denied service by Qwest, the NMPRC found that these resellers "are neither competing with Qwest for the same customers nor providing New Mexicans with an 'actual commercial alternative.'"[42]

The Commission has emphasized that it will defer to state findings on issues of fact, particularly where, as here, the state commission conducted a thorough factual investigation. In its Application, Qwest does not take issue with any of the findings of the NMPRC relating to residential resale in New Mexico. Nor does it present any evidence refuting the NMPRC's conclusion that residential resellers in New Mexico are not competing with Qwest in any real sense, but instead are just picking up customers that Qwest refuses to serve. There is no non-

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[39] *Id.* ¶¶ 132, 136.
[40] *Id.* ¶¶ 136-37.
[41] *Id.* ¶ 136.
[42] *Id.* ¶ 137.

arbitrary basis on this record to conclude that Qwest's showing with respect to residential resale is sufficient to demonstrate compliance with Track A.

C. Qwest's Showing With Respect To The PCS Carrier Does Not Demonstrate That There Is An Actual Commercial Alternative To Qwest For Residential Service In New Mexico.

Unable to show that there exists any facilities-based wireline competition in New Mexico, and unable to rely on the scant (and shrinking) amount of resale in New Mexico to satisfy Track A, Qwest invites the Commission to, for the first time ever, find that the existence of a single PCS provider in two New Mexico cities is sufficient to satisfy Track A. The Commission must reject that invitation as well. Qwest bears a substantial burden of proving that a PCS service constitutes "an actual commercial alternative to the BOC" that satisfies Track A.[43] The "Cricket" service relied by Qwest does not remotely satisfy this standard.

As noted, the Cricket service is available in only two New Mexico cities, Albuquerque and Santa Fe.[44] Therefore, the Cricket service is not even an alternative – let alone a commercial alternative – to wireline services in the vast majority of New Mexico. And the future of the Cricket wireless service even in those two cities is open to question. As Leap Wireless, the company that offers the "Cricket" service in New Mexico, has explained:

> Each of the Cricket Companies is a borrower or guarantor under the senior secured vendor credit facilities of Cricket, and Cricket is currently in default under the vendor credit facilities because it has failed to pay interest and has failed to comply with other covenants under those facilities. These and other existing events of default provide the credit facility lenders with various rights under their credit agreements. . . . In addition, the holders of the vendor debt could institute an involuntary bankruptcy proceeding against the Cricket Companies. . . . [I]f they choose to exercise these rights in the

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[43] *See, e.g., Louisiana I 271 Order* ¶¶ 31-34.

[44] This information is available at Cricket's website. <http://www.cricketcommunications.com/state.asp?state=New%20Mexico&map=1>.

> future, Leap and Cricket would likely seek the protection afforded by Chapter 11 of the federal bankruptcy laws.[45]

Shortly before Qwest filed its application, Leap Wireless was de-listed from NASDAQ, making it even more difficult for Leap Wireless to find funding for its current activities and future plans.[46]

But even in the two cities where Cricket currently offers its wireless service, that service is hardly an actual *commercial* substitute for Qwest's wireline services. Rather, with its brightly colored phones and low-end services, Cricket targets the youngest telephone consumers; indeed, more than half of its customers are in the *18 to 24* year age range.[47] Of course, teenagers and college students, who often would not otherwise have wireline service, are hardly a good proxy for residential customers in general, and evidence that these young consumers have purchased Cricket's wireless service can hardly be considered evidence that the Cricket service is a commercial alternative to Qwest's wireline services.

And for the vast majority of customers, Cricket's PCS service simply cannot be considered a legitimate alternative to Qwest's wireline service. Cricket's PCS service, for example, does not provide E-911 service with the capability to allow, in an emergency, the 911 call center to locate the PCS customer, even if the PCS customer is calling from home.[48] This life-and-death difference between PCS service and Qwest's wireline services is by itself

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[45] Leap Wireless International Inc., Form S-1, filed with the United States Securities Exchange Commission on Nov. 21, 2002, at 1.

[46] *Id.* at 3.

[47] *See, e.g.,* Cricket Gears Up For The New School Year, Seigenthaler Public Relations, Inc. (August 20, 2002), available at <http://www.seig-pr.com/newsrelease.asp?key=320>.

[48] *See* Letter from David Solomon (Leap Wireless) to Thomas Sugrue (Chief, Wireless Telecommunications Bureau), Re: E911 Quarterly Report (filed November 1, 2002) (showing that Leap Wireless does not even plan to upgrade its New Mexico service to Phase II-type E911 service).

sufficient to demonstrate that the PCS service upon which Qwest relies is not a commercial alternative to Qwest's wireline service.[49]

In addition, Qwest is not subject to local number portability requirements with respect to PCS carriers. Therefore, a Qwest customer that attempted to migrate from Qwest's wireline service to Cricket's service would not be able to retain her original telephone number.[50] Nor could a Cricket customer keep her telephone number if she wanted to switch carriers. As the Commission has emphasized, without such local number portability capabilities, competition with the BOC's wireline service is severely hampered.[51]

There also are other deficiencies in Cricket's PCS service compared to Qwest's wireline service. Whereas wireline customers can have multiple handsets – *e.g.* one in the bedroom, one in the kitchen and one in the home office – a Cricket customer can have only one handset per line. Also Cricket's service locks its customers into long-term contracts of at least 12-months, whereas Qwest's wireline service does not.[52] And Cricket customers cannot purchase DSL

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[49] The Commission has expressly recognized that E911 capabilities – particularly the capability to locate and call-back a wireless customer – is necessary in the public interest, and is required to make wireless service safety functions on par with those already offered by wireline services. *See, e.g.,* Report And Order And Further Notice Of Proposed Rulemaking, *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* 11 FCC Rcd. 18676, ¶¶ 3-5 (1996).

[50] This is confirmed by the information posted on Cricket's website. <http://www.cricketcommunications.com/ faqs.asp>.

[51] *See, e.g.,* Memorandum Opinion and Order, *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation And Telephone Number Portability*, 17 FCC Rcd 14972 (2002) ("The Commission determined that implementation of LNP, which would enable wireless subscribers to keep their phone numbers when changing carriers, would enhance competition between these carriers as well as promote competition between wireless and wireline carriers. This determination was supported at the time by many in the wireless industry, particularly new Personal Communications Services (PCS) providers, who viewed wireless LNP as important to promoting competition with more established cellular carriers.").

[52] *See* <http://www.cricketcommunications.com/terms.asp>.

service, which is available only to wireline subscribers.[53] The Cricket service may be a well-packaged and priced wireless service that is attractive to young adults, but it cannot reasonably be considered an actual commercial alternative to Qwest's residential wireline monopoly in New Mexico.

Qwest addresses none of these issues. Instead, Qwest points to its "survey" of Cricket customers.[54] A survey is no substitute for direct evidence of actual wireless-for-wireline substitution. And it is particularly revealing here that although Qwest plainly has a list of Cricket's customers, Qwest has offered no direct evidence that any of those customers have canceled Qwest's wireline service (and certainly not that anyone other than a teenager or very young adult has done so). Likewise, Qwest makes no attempt to show that Qwest wireless customers have cancelled their wireline services. Qwest certainly knows the identity of its own wireless customers and whether those customers also maintain wireline service. Qwest's failure to provide this type of information can only mean one thing – that in reality, Qwest's wireless customers continue to purchase Qwest's wireline service, confirming that wireless service is not a commercial alternative to wireline service.

In any event, as the NMPRC explained, the survey relied on by Qwest is itself fundamentally flawed; there were "significant problems inherent in the design, methodology and

[53] It appears that Qwest does not offer a separate DSL-only service to residential customers.

[54] Aside from the survey, the only other "evidence" provided by Qwest that Cricket's service is a commercial alternative to Qwest's wireline service is that Cricket markets its service "as a *potential* replacement for a first or additional home landline." Teitzel Dec. ¶¶ 47-48 (emphasis added). But the Act's requirements obviously cannot turn on aspirations expressed in commercial advertisements, particularly, where, as here, the *actual* customer base appears to be based largely of teens and young adults. *See NMPRC Section 271 Final Order* ¶ 143 ("Qwest also presented how Cricket management would like consumers to *perceive* its service, but there is nothing in this evidence demonstrating that consumers are *actually using* this service as a replacement to Qwest wireline service") (emphasis in original).

implementation of the Cricket survey."[55] As an initial matter, the survey focused only on existing Cricket customers. In other words, the survey was in no way random and can provide no reliable information whether residential consumers generally view Cricket's service (or any wireless service) as an actual commercial alternative to Qwest's wireline services. As noted, Cricket customers are weighted heavily towards the niche of teenagers and young adults who Cricket targets and who are the most elastic purchasers of wireline services. The fact that a small subset of this niche might find Cricket's service to be a legitimate substitute to Qwest's wireline services – and the survey results do not demonstrate even this much – does not suffice to show that New Mexico residents as a whole generally consider the two products to be substitutes. Qwest's survey made no attempt whatsoever to assess whether the respondents were representative of New Mexico residential customers, and not some unrepresentative niche subset of customers, say college students, who may not have sufficiently permanent residences to justify a wireline telephone.

In any event, as the NMPRC held, the survey was so flawed in design, methodology and implementation that its results are meaningless even as a guide to the views of the unrepresentative set of customers who have actually purchased the Cricket service in New Mexico. As the NMPRC noted, the survey was "an 'agree/disagree' survey type, which is commonly perceived as being unreliable," it is unclear whether respondents even understood the questions, particularly since the key term "wireline" was not defined in the first round of the survey.[56] In this regard, the NMPRC noted that Qwest failed to perform a pre-test of the survey questions to refine them and identify problems (even though the first portion of the survey was conducted in two distinct time periods).[57]

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[55] *NMPRC Section 271 Order* ¶ 154.
[56] *Id.* ¶ 149.
[57] *Id.*

Respondents to the survey were asked an introductory question, plus the following questions:

> 2. When some people need to start phone service, they might decide to use the Cricket phone instead of having traditional wire line phone service hooked up in their home. *Does this apply to you?*
>
> 3. Some Cricket customers might decide that Cricket service does away with the need to have traditional wire line phone service in their home. As a result, they terminate their wire line phone services from the local phone company. *Does this apply to you?*
>
> 4. Thirdly, some Cricket phone users might find that having Cricket means they can cancel phone service on a second or additional telephone line in their home. *Does this apply to you?*
>
> 5. Lastly, some Cricket customers might find that using the Cricket service from inside their home replaces the need to add a new or additional telephone line. *Does this apply to you?*[58]
>
> 6. (follow-up question) "Do you have wireline local telephone service in your home?"[59]

It is clear that this survey is not capable of assessing whether PCS is a commercial alternative to wireline service. Asking respondents whether they "*might* decide that Cricket does away with the need to have traditional wireline phone service in their home" does not mean that the respondent actually *would* cancel wireline service. On the contrary, a respondent that answered "yes" to this question may have meant that she "might" cancel her wireline service *if* Cricket service were to add E-911 capabilities, local number portability, multiple phone capabilities, and DSL capabilities. Or the respondent may have answered "yes" without actually

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[58] *Id.* ¶ 148.

[59] This follow-up question was asked because the first time that Qwest conducted the survey, respondents were not offered a definition of the term "wireline" service. Therefore, Qwest (continued)

knowing about the consequences of canceling wireline service. But the respondent likely would discover those deficiencies if she later became serious about assessing whether to *actually* cancel her wireline service. In short, a "yes" answer to any of Qwest's survey questions does not, as Qwest claims, mean that the customer actually would (or has) cancelled wireline service.

Qwest's "scientific survey" also produced strange results, further confirming the NMPRCs finding that the survey data are entirely unreliable. As noted by the NMPRC, many responses to Qwest's survey were "nonsensical" because the respondents' answers were inconsistent.[60] For example, 30% of the respondents in the first round of the survey gave inconsistent answers to questions 2 and 3 by answering "yes" to both questions (indicating both that the respondent had never hooked up a wireline phone and that they had disconnected their wireline phone).[61] Inconsistent answers were also given to questions 4 and 5 (indicating both that having Cricket means they can cancel phone service on a second or additional telephone line in their home and that the Cricket service from inside their home *does not* replace the need to add a new or additional telephone line).[62]

It was these inconsistencies that prompted the callback question to respondents who had previously answered "yes" to question 3. While Qwest claimed that this cured the problem, critics noted that participants in the callback sample group were not randomly selected and had previous knowledge of the survey, and that the "wireline" definition was not provided unless the respondent sought clarification.[63] In addition, the callback "was completed short of the 3-month

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amended the survey to include a callback consisting of this question. If respondents indicated that they did not understand the term "wireline," a definition was provided.

[60] *NMPRC Section 271 Final Order* ¶ 151.

[61] *Id.* ¶ 149.

[62] *Id.*

[63] *Id.* ¶ 152; *see also BellSouth Louisiana II Order* at ¶ 35 (concluding that the PCS survey proffered by BellSouth was "fundamentally flawed" because "the sample group was not randomly selected").

time period recommended by the [Commission]" and, therefore, did not provide evidence of "long-term substitution." In light of all of these problems, the NMPRC ultimately concluded that the Cricket survey was not "credible" evidence that Cricket's PCS service is actually being used as a substitute for Qwest's wireline service.[64] Qwest offers no basis for the Commission to overturn this evidentiary finding.

It is thus not surprising that after reviewing all of Qwest's evidence relating to PCS as a commercial substitute for wireline service, the NMPRC concluded that, "suppositions aside, there is no single exhibit, strand of testimony or other piece of evidence that proves with any degree of reasonable certainty – let alone evidence sufficient to fulfill the substantial evidence standard that Commission orders must satisfy – that Qwest has met its burden of showing there is an actual and significant number of Cricket subscribers in Qwest's New Mexico territory who have substituted broadband PCS service for Qwest wireline service."[65] Again, Qwest offers no basis for the Commission to second guess these factual findings that were based upon careful consideration of all of the evidence. Qwest's New Mexico application must be denied.

II. QWEST'S FAILS TO SATISFY ITS BURDEN OF PROVING THAT THE APPLICATION COMPLIES WITH THE COMPETITIVE CHECKLIST.

Qwest's application also fails to satisfy the competitive checklist in three respects. First, in all three states, Qwest charges unlawful "entrance facility" charges for certain interconnection and transport links connecting CLEC switches to the nearest Qwest switch. Second, Qwest does not provide appropriate reciprocal compensation arrangements in New Mexico, because it has unilaterally begun charging access rates for certain indisputably local traffic that it deems "transiting" traffic. Third, in Oregon, Qwest has eliminated a loop qualification information

[64] *Id.* ¶ 154.
[65] *Id.* ¶ 155.

provision of its SGAT, which is necessary to prevent discrimination and is included in all other SGATs in its region.

A. Qwest Levies Unlawful "Entrance Facility" Charges For Interconnection Trunks and Dedicated Transport.

Qwest's SGATs in all three states impose unlawful "entrance facility" charges on CLECs obtaining interconnection trunks from Qwest. Contrary to Qwest's previous claims (*see Qwest 9-State 271 Order* ¶ 336), there is no sound economic or engineering reason why Qwest should levy an "entrance facility" charge, which is essentially a loop charge, for these interconnection trunks, and such charges are therefore anticompetitive and inconsistent with the Commission's rules.[66]

When a CLEC wishes to establish interconnection between its switch and a Qwest switch, Qwest's SGATs deem *any* Qwest-provided transport between the CLEC switch (or other POI) and the nearest Qwest wire center (called the "serving wire center" or SWC) to be an "entrance facility." Whenever a CLEC wishes to establish a connection from its own switch to a Qwest switch using interconnection trunking provided by Qwest, Qwest requires the CLEC to purchase an "entrance facility" from the CLEC switch to the nearest Qwest serving wire center.[67] These "entrance facilities" are considered to be "high speed digital loops" and are priced as such – *i.e.*, the charges for entrance facilities are flat-rated and *non*-distance-sensitive. If the CLEC wishes to establish interconnection with a Qwest switch other than the nearest Qwest switch, Qwest forces the CLEC to purchase both the entrance facility (to the Qwest SWC) and what it calls "direct trunked transport" between Qwest switches (*i.e.*, from the serving wire center to the

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[66] *See* 47 U.S.C. §§ 251(c)(2), 252(d)(2); 47 C.F.R. § 51.705. The same issue applies to Qwest's UDIT and EUDIT charges for transport. *See Qwest 9-State 271 Order* ¶ 364 n.1327.
[67] *See* SGAT § 7.1.2.1.

CLEC's desired Qwest switch). Direct Trunked Transport is a flat-rated, distance-sensitive charge.[68]

Qwest's "entrance facility" charges are unlawful because they do not reflect the way in which these costs are incurred. There is no economic or engineering difference whatsoever between the "entrance facility" – the transport link between the CLEC's switch and the SWC – and the "direct trunked transport" – the second link between Qwest's wire centers. Accordingly, there is no justification for creating separate "entrance facility" and "direct trunked transport" charges. Qwest has improperly borrowed the "entrance facility" concept from the context of access charges; in that context, entrance facilities are priced like loops and were originally designed to function as subsidy elements.[69]

The principal effect of these "entrance facility" charges is dramatically to raise the price of interconnection, because the CLEC switch is often in close proximity to the Qwest "SWC." The CLEC should be able to obtain "Direct Trunked Transport," without need for any entrance facilities or other costs, continuously from the CLEC switch to the Qwest switch where it seeks interconnection, whether a tandem or directly to an end office.[70] The CLEC should not be required to order an additional entrance facility, which only serves to raise the cost of interconnection, in violation of sections 251(c)(2) and 252(d)(2).[71]

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[68] *See* Wilson Dec. ¶¶ 8-9; Freeberg Interconnection Dec. ¶¶ 18-19.

[69] Wilson Dec. ¶ 10.

[70] Wilson Dec. ¶ 11.

[71] Although the SGATs state that CLECs may request other technically feasible means of interconnection, which Qwest will consider through the Bona Fide Request process (*see* SGAT § 7.1.1), this provision has nothing to do with Qwest's classification of facilities between the CLEC switch and the Qwest SWC as "entrance facilities," which Qwest insists on pricing as if the CLEC had ordered a loop. In other words, although CLECs may request other technically feasible physical arrangements for interconnection, it would still be the case that any Qwest-provided trunking between the CLEC switch and the nearest Qwest switch would be deemed an "entrance facility." Wilson Dec. ¶ 12.

In the 9-state proceeding, Qwest claimed that "there are economies of scale and scope that reduce the per-trunk cost for trunks between Qwest offices," relative to CLEC "entrance facilities."[72] That is incorrect. The trunking between a CLEC wire center and the nearest Qwest wire center, which Qwest calls the "serving wire center," is identical in type and quantity to the trunking between many, or even most, Qwest Central Offices (COs). In particular, CLEC switches in the CLEC wire centers are typically as big or bigger than the average Qwest switches.[73] This should not be surprising, because while Qwest may have a dozen switches in a metropolitan area, the CLEC will usually have only one or two to handle the same geographic area (in an attempt to achieve scale economies in switching comparable to those of Qwest). Moreover, Qwest has insisted since the passage of the Act that all CLEC facilities going to Qwest from a CLEC office must go through a single Qwest wire center. As a result, a CLEC's entire volume of interconnection traffic in a metropolitan area is usually concentrated in a single "entrance facility" connected to a single Qwest serving wire center.

Given that Qwest and CLECs are exchanging a very large volume of traffic between large switches over these "entrance facilities," it should be apparent that the "economies of scale and scope" for such facilities are comparable to those on transport between Qwest switches. Indeed, Qwest usually emphasizes the fact that interconnection traffic has grown over the past five years until now it comprises a substantial percentage of all traffic in most Qwest states. Qwest cannot have it both ways. If transport costs between Qwest switches are lower due to economies of scale, then so are the costs between CLECs and Qwest's serving wire centers.[74]

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[72] *Qwest 9-State 271 Order* ¶ 336.

[73] Qwest recently revealed that 56% (43 out of 77) of its switches in Oregon are smaller than 10,000 lines. *See* Qwest ex parte Letter, filed January 29, 2003. CLECs switches are usually larger than 10,000 lines.

[74] *See* Wilson Dec. ¶¶ 14-16.

Qwest also claimed that "it is more likely that additional electronics will be needed for links to competitive LEC offices."[75] Again, this is nonsense. Interconnection facilities between the Qwest serving wire center and the CLEC wire center are almost exclusively fiber facilities, just like the facilities between Qwest offices. Moreover, as noted above, these facilities frequently carry call volumes comparable on average to call volumes on transport connecting Qwest's wire centers. For these reasons, the electronics necessary for these "entrance facilities" are comparable to those Qwest uses on its own interoffice transport. CLECs have installed their own fiber facilities to many Qwest offices and lease others from Qwest, and these facilities have been in place in most CLEC wire centers for many years. They are permanent facilities that are augmented in the same way that transport links between Qwest wire centers are augmented. The terminal equipment between the CLEC wire center and the Qwest wire center typically consists of fiber add-drop multiplexers, but the same is true of Qwest's interoffice transport. The fiber and the terminal equipment handle interconnection traffic along with private line traffic and access traffic, just as facilities between Qwest wire centers do.

Indeed, the electronics at issue here perform minimal functions. Most of the traffic that the CLEC hands off to Qwest at the "serving wire center" is bound for a more distant switch, and therefore Qwest does not need to perform any multiplexing functions; the traffic is simply carried to another Qwest switch, where Qwest uses a multiplexer to "drop off" the traffic. In this respect, the "entrance facility" is fundamentally different from a fiber loop connecting an end-user premise to a Qwest switch, where Qwest would typically break out all such loops at the central office and terminate them at the Qwest end office switch.[76]

In short, there is simply no material difference between the "entrance facility" connecting the CLEC switch and the Qwest serving wire center and the other transport facilities in Qwest's

[75] *Qwest 9-State 271 Order* ¶ 366.

local network. Qwest's treatment of the CLEC facilities as if they were loops is not realistic and ignores the fact that these are transport facilities carrying traffic between major switching centers – namely the CLEC central offices.[77]

B. Qwest Denies CLECs Appropriate Reciprocal Compensation Arrangements For Certain Traffic in New Mexico.

In New Mexico, Qwest has also recently begun denying CLECs appropriate reciprocal compensation arrangements for certain traffic that it claims is "transiting" traffic.[78] AT&T's interconnection agreement in New Mexico provides that the parties are to apply a "percent local usage" (PLU) factor when determining whether interconnection traffic is local (and thus subject to TELRIC rates) or access traffic (subject to access charges). Qwest, however, has recently begun to deem local traffic that is terminated on a third party's network to be "access" traffic, and has begun to bill AT&T access rates for such local traffic. In at least one state (Arizona), this has resulted in a dramatic flip in the PLU factor from a roughly 60%/40% split between local and toll traffic to 10%/90%.

Qwest's actions are patently unlawful. There is no dispute that the calls at issue are purely local calls, and therefore reciprocal compensation for such calls is governed squarely by

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[76] *See* Wilson Dec. ¶¶ 17-19.

[77] The Commission also repeated Qwest's assertion that the Commission had approved other Section 271 applications in which the BOC had a "similar" rate structure for interconnection and transport, but the cited orders do not address the issue at all. *See Qwest 9-State 271 Order* ¶ 365 & n.1334 (citing *Texas 271 Order* ¶ 82 and *Pennsylvania 271 Order* ¶ 104). The Commission also noted that Rule 51.509(c) does not specify that dedicated transport rates must be distance sensitive (*Qwest 9-State 271 Order* ¶ 365), but the Act requires rates to be cost-based and Rule 51.507 requires rates to be "structured consistently with the manner in which the costs of providing the elements are incurred." As AT&T has demonstrated, there is no economic or engineering reason why, pursuant to these statutory and Commission standards, a requesting carrier should pay any rate other than a single, distance-sensitive rate for the entire link between the CLEC switch and the ultimate Qwest switch.

[78] Qwest has also adopted the same sudden shift in position in other states in its region that are not the subject of the instant application, including Arizona, Idaho, Montana, and Utah. Qwest
(continued)

Section 251(b)(5) of the Act and the Commission's reciprocal compensation rules requiring TELRIC rates. Whether these indisputably local calls terminate on Qwest's network or another carrier's, the Act and the Commission's rules require Qwest to charge TELRIC rates for such local traffic.[79]

Qwest's only cited basis for its sudden change of position is Section 17.1 of the reciprocal compensation attachment to its interconnection agreement with AT&T. Until December 2002, both parties interpreted the agreement to deem such traffic as local, and Qwest billed AT&T accordingly. Now, Qwest claims that the last sentence of Section 17.1, which states that "[a]bsent a separately negotiated agreement to the contrary, compensation for local reciprocal traffic exchange applies solely to traffic exchanged directly between the Parties without the use of third party transit providers," leads to the opposite conclusion. This provision, however, by its plain language refers to situations in which there is a third party transit carrier *between* AT&T and Qwest; the agreement states merely (and unsurprisingly) that in such situations (where AT&T and Qwest are not directly handing off traffic to one another), there is no assumption that AT&T and Qwest have a compensation agreement.[80]

The interpretation of the agreement that all parties have observed until now is the only interpretation consistent with both the law and the terms of the agreement. Qwest's current actions are therefore a violation of checklist item one.

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has unilaterally imposed such changes without using the change management process, as its interconnection agreements require. *See* Wilson Dec. ¶ 21.

[79] *See also* 47 U.S.C. § 251(a)(1); *Local Competition Order* ¶ 997 (for purposes of Section 252(c)(2) interconnection, "transport" and termination must be provided at cost-based rates).

[80] *See* Wilson Dec. ¶ 24.

C. Qwest Denies CLECs Necessary Loop Qualification Information in Oregon.

In Oregon, Qwest denies CLECs information necessary to order unbundled loops in situations in which Qwest has deployed IDLC technology. Indeed, all of Qwest's SGATs, except for Oregon, contain the following section (§ 9.2.2.2.1.1), which provides that:

> In areas where Qwest has deployed amounts of IDLC that are sufficient to cause reasonable concern about a CLEC's ability to provide service through available copper facilities on a broad scale, CLEC shall have the ability to gain access to Qwest information sufficient to provide CLEC with a reasonably complete identification of such facilities. Qwest shall be entitled to mediate access in a manner reasonably related to the need to protect confidentiality or proprietary information. CLEC shall be reasonable for Qwest's incremental cost to provide such information or access mediation.

This provision gives CLECs the right to gain access to Qwest information on outside plant facilities such as copper feeder. Copper feeder is necessary in areas where Qwest has predominantly IDLC facilities so that CLECs can provide advanced services such as DSL. Without access to the appropriate data, CLECs will not be able to determine if facilities are available. The Commission has unambiguously held that CLECs are entitled to all available loop qualification information in Qwest's databases or internal records, in the same time intervals that it is available to any Qwest personnel, regardless of whether Qwest retail personnel have access to such information.[81] Qwest's decision to eliminate this provision from its Oregon SGAT denies CLECs the information to which they are entitled.[82]

Qwest's elimination of this provision is all the more troubling because Qwest had entered into secret agreements with a CLEC, which applied in Oregon, that provided electronic access to Qwest's Outside Plant Record databases (OSP-FM) – a database that would provide access to

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[81] *See UNE Remand Order* ¶¶ 427-31; *Qwest 9-State 271 Order* ¶ 61 n.208.
[82] Wilson Dec. ¶ 27.

information concerning the availability of copper alternatives to Qwest's installed IDLC plant.[83] Qwest maintains that AT&T cannot now opt into such agreements because the CLEC is now out of business. Qwest's willingness to enter into such an agreement serves only to confirm that it is currently failing to provide full and complete access to loop qualification information.

III. A GRANT OF QWEST'S APPLICATION IS NOT IN THE PUBLIC INTEREST.

The record in this three-state proceeding precludes any finding that a grant of Qwest's new application is consistent with the public interest. At the heart of the public interest inquiry, as Congress conceived it, is a determination of whether, notwithstanding checklist compliance, Qwest has fully and irreversibly opened its local markets to competition.[84] As the Commission has recognized, if Qwest "has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations," it can be denied Section 271 authority because the market-opening provisions of the 1996 Act "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations."[85]

Although the Commission has stated that it "will not withhold Section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination," it will take such

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[83] Wilson Decl. 28 (Scindo, Confidential Settlement Agreement, May 4, 2001; Scindo, Confidential Settlement Agreement, August 10, 2001). Indeed, AT&T repeatedly asked Qwest in the Oregon workshops to provide information on spare facilities, and Qwest never indicated that the OSP-FM database would provide such information. Its subsequently revealed secret agreements now make clear that Qwest understood the relevance of the OSP-FM database. *See id.*

[84] *See Texas 271 Order* ¶ 431. Recently, the Commission has expressed this analysis somewhat differently, explaining that it "views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected." *Qwest 9-State 271 Order*, ¶ 419.

[85] *Michigan 271 Order* ¶ 397.

action where "a pattern of discriminatory conduct" exists that undermine its confidence that the relevant "local market is open to competition and will remain so" after the grant of Section 271 authority.[86] Despite Chairman Powell's admonishment that "unlawful, anti-competitive behavior is unacceptable,"[87] in the *Qwest 9-State 271 Order* the Commission chose to excuse Qwest's extensive pattern of violating Sections 251 and 252, and on its own motion waived its "complete-as-filed" rule to permit the grant of Qwest's nine-state application.[88] The Commission grounded its defense of the grant of 271 authority on its belief that the last-minute disclosure or termination of dozens upon dozens of agreements that had remained unlawful and discriminatory for years eliminated "the possibility of ongoing discrimination" and future "noncompliance with section 252."[89] In so doing, the Commission excused years of discrimination, and found checklist compliance with all the items in the checklist that require nondiscrimination, by crediting last-minute terminations of discriminatory agreements and new promises of future compliance.[90]

Qwest's latest three-state application must be rejected because it fails to fit within even the most relaxed public interest framework. First, Qwest has not established a record that supports the conclusion, at least with respect to New Mexico, that all relevant interconnection agreements have been "filed, expired, terminated [or] superceded."[91] Instead, as the New Mexico Public Regulation Commission (the "NMPRC") has held, Qwest did not respond completely to its discovery requests, and for this and other reasons, the NMPRC "believes there

[86] *See Michigan 271 Order* ¶¶ 396; *Texas 271 Order* ¶ 431; *New York 271 Order* ¶ 431, 444.

[87] News Release, *FCC Fines SBC Communications, Inc. $6 Million For Violations Of Commission Merger Condition*, Statement of Chairman Michael Powell, released October 9, 2002.

[88] *Qwest 9-State 271 Order*, ¶¶ 486, 490, 495.

[89] *Id*. ¶¶ 486-87.

[90] *See id*. ¶ 466.

[91] *Id*. ¶ 491.

may exist additional agreements that should be filed with the Commission for approval pursuant to the Act in keeping with the definition of the term 'interconnection agreement' as adopted in" the NMPRC's Order.[92] Second, although in its *Qwest 9-State 271 Order*, the Commission found no evidence of Qwest's intent to violate section 251 or 252, evidence and findings of such intentional disregard for compliance with the Act is present in the New Mexico proceeding. In such circumstances, the Commission cannot excuse Qwest's historic disregard for compliance with the nondiscrimination requirements of the checklist and find that Qwest complies with those checklist items, much less find that Qwest's local markets are open to competition and will remain open in the future.

In March 2002, as a result of allegations by AT&T arising out of the proceeding in Minnesota, and the conclusion of the NMPRC's staff that "these allegations would raise serious public interest concerns, the NMPRC appointed a hearing examiner to conduct an expedited investigation" into Qwest's practice of entering into secret deals.[93] In June of 2002, several days of hearings were conducted. During that hearing, the Attorney General "moved for sanctions to be imposed on Qwest for its failure to respond completely to discovery" requests.[94] Among other things, Qwest failed "to respond to 22 of it 49 interrogatories."[95] As a result of this failure and other evidence that Qwest had not filed all the agreements that the NMPRC had ordered Qwest to produce in response to its order initiating the investigation, the NMPRC concluded:

> The incomplete discovery process in the expedited proceedings called for by the *Order Initiating Investigation* seems to indicate that the evidentiary record in this case may not contain all the documents Qwest was ordered to produce.[96]

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[92] *Id.* ¶¶ 260, 297.
[93] *Id.* ¶¶ 164-66.
[94] *Id*. ¶ 260.
[95] *Id*.
[96] *Id*.

In August 2002, the NMPRC received post-hearing briefs and proposed findings of fact and conclusions of law. The NMPRC then established a definition of "interconnection agreement,"[97] assessed more than 40 previously unfiled agreements between Qwest and CLECs, and reached conclusions about the lawfulness of Qwest's actions and appropriate sanctions.

In the *NMPRC Final Order*, the NMPRC concluded that Qwest had engaged in significant anticompetitive behavior. Indeed, the NMPRC spent more than six pages assessing approximately 15 agreements between Qwest and McLeod USA, and concluded that these agreements "indicate extensive business arrangements between the two over a number of years concerning interconnection rates, terms and conditions, but as these agreements were not filed, other CLECs had no opportunity to review them or opt into the conditions; these CLECs were apparently the subject of discriminatory behavior by Qwest and McLeod."[98] The NMPRC also focused on a number of agreements between Qwest and Eschelon, concluding that these agreements confirmed that Qwest had "entered into numerous agreements, which should have been filed pursuant to the Act and which contain provisions that appear to be contrary to the public interest" and were discriminatory.[99] Finally, to confirm the widespread nature of Qwest's practice, the NMPRC cited and discussed other discriminatory secret deals with e.spire, GST Telecom, WorldCom, and Z-Tel concerning the rates, terms and conditions of interconnection.[100]

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[97] In establishing the appropriate definition of "interconnection agreement," the NMPRC indicated that Qwest had defined in its SGAT a much narrower definition of "interconnection agreement" than it acknowledged was required in the hearing proceeding. *Id*. ¶ 270d. The NMPRC held that "backward looking" secret settlement agreements "could effectively amend a rate or other term in a filed interconnection agreement to the disadvantage of CLECs not privy to the secret settlement agreement." *Id*. Because it feared Qwest's use of secret side agreements, it required the filing of all agreements, whether retrospective or prospective, and even mandated the filing of agreements entered into in bankruptcy court proceedings "that purport to settle some or all issues in pending cases." *Id*.

[98] *Id*. ¶ 290.

[99] *Id*. ¶ 292.

[100] *Id*. ¶ 293.

The NMPRC made findings that instead support the conclusion that Qwest knowingly and intentionally engaged in discrimination. For example, the NMPRC found that secret agreements were produced "with terms, conditions and rates that clearly should have been filed. Qwest apparently chose not to file these agreements, but rather to mark them confidential and keep them secret."[101] The NMPRC also expressly found that the "review of the unfiled agreements in this proceeding leads to the unavoidable conclusion that only Qwest was aware of all terms, conditions and rates available, because Qwest had secret agreements with certain CLECs that altered the terms, conditions and rates of the filed, approved interconnection agreements."[102]

In addition to these significant findings, the NMPRC went further and recognized that Qwest's conduct in its proceeding had not sufficiently eliminated the possibility that Qwest's secret deals are still extant. The NMPRC thus held that in addition "to the agreements produced by Qwest on order of the" NMPRC:

> the Commission believes there may exist additional agreements that should be filed with the Commission for approval pursuant to the Act in keeping with the

[101] *Id.* ¶ 294.

[102] *Id.* ¶ 295. The NMPRC's conclusions were completely consistent with the findings and conclusions in the Minnesota proceeding that Qwest had knowingly and intentionally violated Sections 251 and 252, which were generally ignored by the Commission in its *Qwest 9-State 271 Order*. *See* Minnesota ALJ Decision at 53. As the Commission will recall, the evidence of Qwest's intentional anticompetitive conduct, the Minnesota ALJ had held that while McLeod requested that Qwest put an agreement in writing, Qwest refused to do so because "other CLECs might feel entitled to the same discount if the agreement were written and made public." *Id.* at 44. The ALJ also found that Qwest had offered financial incentives to "withhold information from regulators that may be relevant to Qwest's section 271 applications," and "covertly assist Qwest in manipulating various regulatory proceedings." *Id*. In short, like the NMPRC, the ALJ found that Qwest "intentionally structured agreements to prevent their disclosure as filed interconnection agreements," showing a clear disregard for the mandates of sections 251 and 252. *Id.* at 52.

> definition of the term "interconnection agreement" as adopted in [the *NMPRC Final Order*].[103]

For at least two reasons, the FCC would commit error by granting Qwest's application under the present circumstances. First, the record, at least in New Mexico, reflects the significant state commission concern that Qwest's pervasive practice of entering secret deals has not been "cured" completely by its new practice of terminating longstanding discriminatory deals, because additional secret agreements may still exist.[104] Unlike the Commission's previous order concerning Qwest's practice of entering secret deals, the Commission therefore cannot conclude that the state commissions' actions have "cured any violation on a going-forward basis."[105]

Second, unlike the previous Commission grant of Section 271 authority to Qwest, this application involves a state where express findings have been made that Qwest knowingly and intentionally engaged in discriminatory behavior. The Commission thus simply cannot ignore Qwest's pattern of discriminatory conduct that existed for several years prior to its demand for Section 271 authority, and find compliance with either the checklist items that are grounded in nondiscrimination or the public interest. Qwest's historic and pervasive discriminatory conduct serves as substantial evidence that it cannot be relied upon to provide nondiscriminatory access and that its markets are not open to competition.

The stark truth about Qwest's commitment to opening its markets to competition and complying with the statutory mandates of the Act is confirmed by the pattern of anticompetitive

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[103] *NMPRC Section 271 Final Order* ¶ 297. This concern clearly was supported by the NMPRC's findings regarding Qwest's actions during the discovery process of this proceeding in August of 2002, well after Qwest claims that it had adopted new, more inclusive filing policies. *See id*. ¶ 260.

[104] *Id*. ¶ 297 ("the Commission believes there may exist additional agreements that should be filed with the Commission for approval pursuant to the Act in keeping with the definition of the term 'interconnection agreement' as adopted" by the NMPRC).

conduct that Qwest has evidenced across the board. AT&T has provided extensive evidence and findings that, while offering some carriers discriminatory secret deals, Qwest has simultaneously engaged in effort after effort to circumvent the restrictions against its provision of interexchange service, from its failed Arizona interLATA gambit, through its adjudicated violations of Section 271, to its ongoing use of "lit-fiber capacity IRUs" and "corporate communications."[106] Moreover, numerous federal investigations into Qwest's accounting and other disclosure practices have revealed misconduct that was tied unalterably to its unlawful provision of long distance service. AT&T, and others, have demonstrated that Qwest's sales of "lit fiber capacity IRUs" constitute the provision of long distance service in violation of section 271,[107] but these allegations have gone unresolved by the Commission for *three years*.[108] Furthermore, AT&T has documented that in a variety of states and in a variety of ways, Qwest has inhibited local entry by, among other things, refusing to permit UNE-P testing or to provide access to inside wiring in multiple dwelling units.[109] Finally, Qwest has been shown to have concealed from CLECs crucial information and abilities that Qwest previously asserted were not available, including local loop data collection (MLT). In sharp contrast to the Act's requirement that a

[105] *Qwest 9-State 271 Order*, ¶ 490.

[106] AT&T (Qwest I) Comments at 138-144.

[107] *Id*. at 143-144; CompTel (Qwest I) Comments at 7-13; Touch America (Qwest I) Comments at 13-19. Qwest's IRUs are virtually indistinguishable from private line services, and Qwest has aggressively marketed them to "winback" private line customers that it was required to divest in connection with the US WEST merger.

[108] Although Qwest had long claimed that these IRUs constituted the "sale" of long distance assets, and therefore not prohibited interexchange services, during the second half of 2002, it was forced to acknowledge accounting irregularities that suggest just the opposite. Moreover, immediately prior to the Commission's grant of the Qwest 9-State application, Qwest was forced to admit that other similar arrangements violated Section 271. *Qwest 9-State 271 Order*, ¶ 501. The Commission has yet to take enforcement action on either the violations that Qwest has been forced to admit, or the violations alleged for years now by CLECs.

[109] AT&T (Qwest III) Comments at 133-147.

BOC be committed to open its local markets to competition, the facts reveal that Qwest has become committed to practices that evidence disdain for "sharing, as the law requires."[110]

Although Qwest would separate each and every one of these violations, and refuse to consider any one of them a pattern or practice sufficient to warrant a denial of Section 271 authority, the public interest is not served by such shell games. Where the facts, both adjudicated and alleged, demonstrate Qwest's hostility to the "market-opening" provisions of the Act and have accumulated with the passage of time rather than abated, a "public interest" denial of Section 271 authority is entirely appropriate, especially where the NMPRC has significant concerns that Qwest has not filed all of its secret interconnection arrangements. Qwest's conduct in entering secret interconnection agreements, evading the requirements of section 271, and inhibiting the entry of competitors to its markets through delay, denial, and dissembling should not be the subject of cavalier referrals to other proceedings on other days. Qwest has attempted to thwart competition with the hope that long-delayed sanctions will be trivial costs of doing illicit business; to date, that has proven to be a viable strategy.

IV. QWEST'S APPLICATION FOR SOUTH DAKOTA CONTRAVENES THE PUBLIC INTEREST BECAUSE QWEST'S PERFORMANCE ASSURANCE PLAN FOR THAT STATE IS INADEQUATE TO DEMONSTRATE SECTION 271 COMPLIANCE.

The current record provides no basis for Qwest's claim that its performance assurance plan ("QPAP") for South Dakota will serve as an effective deterrent against future backsliding.

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[110] News Release*, FCC Fines SBC Communications, Inc. $6 Million For Violations Of Commission Merger Condition*, Statement of Chairman Michael Powell, released October 9, 2002. Of course, the new information Qwest puts forward in the Qwest III Application with regard to compliance with Section 272 shows a similar disregard for the mandate that the books, records and policies of a section 271 affiliate be GAAP compliant. At the same time that Qwest must acknowledge that it cannot certify that its out-of -region long distance subsidiary complies with Section 272, or that its parent has policies, practices and records that are GAAP compliant, Qwest seeks a grant of section 271 authority for a newly-formed long distance entity that without question stands as nothing more than a temporary shell game in the section 271 application process.

There is no factual basis for Qwest's claim that its South Dakota performance remedy plan contains a comprehensive set of self-executing remedies demonstrating that it will continue to provide CLECs with nondiscriminatory service in the wake of any Section 271 relief. Performance monitoring and enforcement mechanisms can "constitute probative evidence that the BOC will continue to meet its Section 271 obligations and that its entry would be consistent with the public interest."[111] But the Commission has made clear that, when an applicant relies on a performance monitoring and enforcement plan to support its application, the Commission will review the contours of that plan to assess whether it provides sufficient incentives for compliance with Section 271, stating:

> Where, as here, a BOC relies on performance monitoring and enforcement mechanisms to provide assurance that it will continue to maintain market-opening performance after receiving section 271 authorization, *we will review the mechanisms involved to ensure that they are likely to perform as promised. While the details of such mechanisms developed at the state level may vary widely, we believe that we should examine certain key aspects of these plans to determine whether they fall within a zone of reasonableness, and are likely to provide incentives that are sufficient to foster post-entry checklist compliance*.[112]

Moreover, the Commission has identified certain key elements in a legitimate performance monitoring and enforcement plan. Thus, in the *New York 271 Order*, the Commission endorsed the New York performance assurance plan because it contained the following characteristics: (1) "potential liability that provides a meaningful and significant incentive to comply with the designated performance standards"; (2) "clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-

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[111] *New York 271 Order* ¶ 429. *See also Massachusetts 271Order* ¶ 236; *Kansas/Oklahoma 271 Order* ¶ 273.

[112] *New York 271 Order* ¶ 433 (emphasis added). *See also Texas 271 Order* ¶ 423; *Kansas/Oklahoma 271 Order* ¶ 273.

carrier performance"; (3) "a reasonable structure that is designed to detect and sanction poor performance when it occurs"; (4) "a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal"; and (5) "[a] reasonable assurance[] that the reported data is accurate."[113] Similarly, in its subsequent decisions reviewing Section 271 applications, the Commission has evaluated each performance remedy plan at issue based upon these characteristics.[114]

Qwest's performance monitoring and enforcement mechanisms for South Dakota do not and cannot satisfy these criteria. As Qwest acknowledges in its Application, it *refused* to implement changes to critical provisions of its QPAP expressly ordered by the South Dakota Public Utilities Commission ("SDPUC").[115] The SDPUC unequivocally stated that "in order for the Commission to find that Qwest's section 271 application is in the public interest, Qwest *shall make* the [specified] revisions."[116] Qwest nevertheless refused to do so.

The first provision imposes an overall cap on Qwest's liability under the plan. Specifically, "[t]he South Dakota QPAP exposes Qwest to an annual cap of 36% of Qwest's 1999 Net Return and allows the [SDPUC] to raise the cap under specified circumstances."[117] The SDPUC concluded that "no cap is the best approach" and unequivocally ordered Qwest to "remove the cap in its entirety."[118] Qwest simply ignored this directive and included the

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[113] *New York 271 Order* ¶ 433.

[114] *See Texas 271 Order* ¶¶ 424-429; *Kansas/Oklahoma 271 Order* ¶¶ 273-278; *Massachusetts 271 Order* ¶¶ 240-247; *Connecticut 271 Order* ¶¶ 76, 77.

[115] Qwest Application at 172; *see also* Declaration of Mark S. Reynolds – South Dakota Performance Assurance Plan, at ¶ 5 ("Reynolds Decl.").

[116] In The Matter Of The Analysis Of Qwest Corporation's Compliance With Section 271(c) Of The Telecommunications Act of 1996, *Order Regarding The Public Interest*, SDPUC Docket No. TC01-165, at 1 (Nov. 22, 2002) ("*Public Interest Order*") (emphasis added).

[117] Reynolds Decl. ¶ 7.

[118] *Order Regarding The Public Interest* at 15, 16; *see also id.* at 39 ("Qwest shall remove the cap on payments to others under the QPAP").

payment cap anyway, asserting that it "could not agree to a QPAP that required unlimited financial liability."[119]

The second provision provides CLECs, Qwest, and the SDPUC Staff with an opportunity to request review of the QPAP every six months.[120] Qwest revised the six-month review provision in certain respects and the SDPUC found that Qwest's revisions were "too restrictive."[121] It ordered Qwest to adopt specific language for this provision.[122] Qwest refused to do so on the ground that "[t]he language recommended by the SDPUC appears to require a contractual concession that the Commission has the authority to make future unknown changes to the QPAP," and instead adopted language from its QPAPs for other states.[123]

In light of Qwest's "conscious decision not to implement all the changes that the Commission ordered" with respect to the QPAP, the SDPUC Staff recently recommended that "[t]he result of Qwest's willful failure to comply with the Commission's orders should be a finding that Qwest's entry into the interLATA market is not in the public interest."[124] On February 4, 2003, the South Dakota Commission followed Staff's recommendation and reaffirmed its prior ruling that Qwest *must* make certain changes to its QPAP in order for the Commission to find that its application is in the public interest. Specifically, the SDPUC stated that it is "unable, at this time, to recommend to the FCC that the granting of section 271 approval

[119] Qwest Application at 172.
[120] Reynolds Decl. ¶ 20.
[121] *Order Regarding The Public Interest* at 26.
[122] *Id.* at 26, 39.
[123] Reynolds Decl. ¶ 21.
[124] In The Matter Of The Analysis Of Qwest Corporation's Compliance With Section 271(c) Of The Telecommunications Act of 1996, *Commission Staff's Response To Qwest Corporation's Notice of Updated Statement Of Generally Available Terms and Conditions*, SDPUC Docket No. TC01-165, at 2 (Jan. 21, 2003) ("*Staff Recommendation*").

to Qwest in South Dakota is in the public interest," and – again – "direct[ed]" Qwest to make specified changes in a revised QPAP.[125]

Significantly, the SDPUC reaffirmed its rejection of the QPAP's payment cap and six-month review provisions notwithstanding its recognition that the Commission had approved similar provisions in Qwest's QPAPs for other states. Specifically, the SDPUC acknowledged that "the FCC specifically found that Qwest's proposed cap in Wyoming did not 'substantially reduce the effectiveness of the PAP.'"[126] The SDPUC nevertheless found:

> [T]his Commission remains concerned that a 36% cap on liability may indeed reduce the QPAP's effectiveness in South Dakota. Given the relatively small population base of South Dakota, the Commission is concerned that Qwest's net revenues in South Dakota may be considerably diminished in the future by Qwest's capital investments in South Dakota. These investments could reduce Qwest's net revenues to such a degree that 36% of net revenues would place very little revenue at risk, thus lessening any deterrent effect. In addition, the same effect could result if Qwest decides to sell more local exchanges in South Dakota.[127]

The SDPUC did, however, modify its position in light of "the FCC's stance"[128] and its own concerns. Specifically, the SDPUC directed Qwest to adopt language specifying that "the limit on liability would be 36% of the prior year's ARMIS net return, or $15,000,000.00, whichever is greater."[129]

With respect to the six-month review provision, the SDPUC "recognize[d] that Qwest's 16.1 language is similar to language the FCC found to be adequate in the Wyoming

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[125] In The Matter Of The Analysis Of Qwest Corporation's Compliance With Section 271(c) Of The Telecommunications Act of 1996, *Order Regarding Compliance Filings And Recommendation To The FCC*, SDPUC Docket No. TC01-165, at 16 (Feb. 4, 2003) ("*SDPUC Compliance Order*").

[126] SDPUC Compliance Order at 9-10 (quoting *Qwest 9-State 271 Order* ¶ 463).

[127] *Id.* at 10.

[128] *Id.* at 11.

QPAP," but expressly found that "that does not mean that this language is right for South Dakota. The point is that, for some reason, Qwest has agreed that the New Mexico Commission can make changes in the six month review but refuses to agree that the South Dakota Commission can do likewise."[130] The SDPUC therefore adhered to its directive on the wording of the provision, reasoning that "[a]llowing the Commission to *review* Qwest's performance without having the express ability within the QPAP to actually *require* changes would be a meaningless exercise."[131]

In light of these deficiencies, the SDPUC correctly recognized that Qwest's South Dakota QPAP cannot possibly serve as an effective deterrent against anticompetitive conduct in the wake of Section 271 relief.

[129] *Id.*
[130] *Id.* at 13.
[131] *Id.* at 14 (emphasis in original).

CONCLUSION

For the foregoing reasons, Qwest's application for authorization to provide in-region, interLATA services in New Mexico, Oregon, and South Dakota must be denied.

Respectfully submitted,

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February 5, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2003, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: February 5, 2003
Washington, D.C.

/s/ Peter M. Andros

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